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July 14, 2014

The Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioners:

Thank you for responding promptly to the court's determination in *Verizon v. Federal Communications Commission* that central components of the *Open Internet Order* of 2010 are inconsistent with the FCC's authority provided in section 706 of the Telecommunications Act of 1996. Your decision to move forward with the Notice of Proposed Rulemaking (NPRM) on Protecting and Promoting an Open Internet provides the public with a critical opportunity to make their views heard. Given that the Federal Communications Commission (the Commission) has a statutory mission to regulate in the public interest, these comments will provide essential information in determining the next steps it must take to ensure that the Internet remains an open, neutral platform upon which to innovate, share ideas and engage in commerce.

As you know, the Internet has transformed our society. It is a general-purpose technology that has reshaped the way in which people communicate and organize, and it has rapidly become a platform for innovation in every sphere of economic activity -- the farmers whose irrigation systems respond to weather projections in America's heartland, the doctors who engage in collaborative diagnoses in New England and New Mexico, the upstart mobile applications developers in Silicon Valley and Silicon Alley who bring new social networking features online, the manufacturers in the Rust Belt who sell networked appliances for our homes and offices, the students in Florida who have online access to ideas and educational courses they could never participate in before, and the grandparents in Texas who see their grandchildren in Maine every day through real time video chat. And not only is the Internet reshaping our society, it is continually being reshaped itself.

When the Internet first came online, it was unclear how people would use the technology, what they would build on top of it, and how the technology and its uses would evolve over time. That is why I fought, along with many other policy makers, to ensure that it stayed open -- that Internet providers and sites would not be subject to crippling civil liability for speech that occurred on their platforms, that Internet products and services would not face multiple or discriminatory taxes, and that the whole technology ecosystem would be largely free from

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government regulation that would stifle innovation or choose winners and losers. ISPs play a critical role in the Internet ecosystem by connecting edge providers and end users to the system and facilitating their data transfers. Our light-touch regulatory approach was based, in large part, on the understanding that whatever other services they may also provide, ISPs would act as neutral intermediaries that would connect their consumer and business customers to the Internet at competitive prices and at the best speeds allowed by ever-improving technology.

This policy environment served as an incubator for the Internet economy. Innovators knew that whatever product or service they offered, it would be available to every Internet user without discrimination. There will be as many as 4 billion internet users by 2018, up from 2.5 billion in 2013.[1] The Internet contributed to as much as 21% of GDP growth in mature countries between 2004 and 2009, and as much as 10% of the growth between 1995 and 2009.[2] The Internet economy is at least 4.7% of the U.S. GDP, growing to as much as 5.4% in 2016[3]. The U.S. enjoys a massive trade surplus in digital services, as U.S. firms export more than $350 billion annually in digital products.

The growing importance of the Internet to economic and personal activity has supercharged politics of the Internet. Voters increasingly care about Internet policy because it affects so much of what is important in their lives, and because the Internet allows them to have an impact on that which is important to them. Internet users have fought back when entrenched businesses have lobbied for policies that would suppress new competitors, when governments have adopted policies that would suppress upstart political speakers, even when government actions are well intentioned but are designed in a manner that would censor, weaken or break the fundamental nature of the Internet. This massive body of active users who defend the Internet as an equal opportunity platform for commerce and expression are the public whose interests it is your duty to act on behalf of.

It is the responsibility of all policy makers to respond to the public's interest in maintaining an open Internet. This is why Congress ultimately abandoned SOPA/PIPA and CISPA legislation. This is why the European Parliament rejected ACTA. This is why the United States is working to ensure that our free trade agreements protect the free flow of data and modifying its previous approach to intellectual property rules in order to ensure that other governments do not adopt rules that would undermine the role the internet plays in global trade and communication.

Today, net neutrality is what the users of the Internet -- all 2.5 billion of them -- demand. Wired ISPs, often operating as a monopoly or duopoly, however, have demonstrated that they are no

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[1] Cisco, VNI Global IP Traffic Forecast (June 2014)
[2] McKinsey Global Institute, Internet Matters: The Net's sweeping impact on growth, jobs, and prosperity(May 2011)
[3] Boston Consulting Group, The Internet Economy in the G-20 (March 2012)

longer willing to abide voluntarily by these fundamental network management principles. This is not only evident in their recent actions, but in large scale plans they have announced to monetize their control over Americans' access to the Internet.

Market conditions are such that consumers have little ability to restrain this behavior on their own. According to the Commission, 96% of Americans have two or fewer choices for wireline broadband access, and at least 8.9% (over 28 million) Americans have access to only one wireline provider.[45] Even in the heart of the nation's capital, consumers often have the choice of only one landline broadband provider. Under these conditions, the proposed merger between the giants Time Warner Cable and Comcast, which would give Comcast over 50 percent of the market for high speed internet access,[6] is a proposition that I hope regulators have the good sense to reject.

The lack of choice and competition among ISPs represents a market failure that provides ISPs with opportunity to discriminate against edge providers, and doing so makes sense as a way to enhance the ISPs' bottoms lines and returns to shareholders. The danger of this situation is evident in the findings of a recent report by the New America Foundation: "most affordable and fast connections are available in markets where consumers can choose between at least three competitive service providers."[7]

So, with this market condition as the backdrop, Internet users are calling upon the Commission to do its job and preserve free and open competition on the Internet. What does this mean -- it means transparency, no-blocking and no discrimination or paid prioritization. And it means regulating on the basis of the legal authority that Congress provided for that purpose.

Transparency

There should be no question that the Commission's 2010 Transparency Rule should be maintained in order to promote Internet openness. As the Commission recognized in its *Open Internet Order*, effective disclosure of broadband providers' network management practices, performance, and commercial terms of service is key to promoting competition, innovation, investment, end-user choice, and broadband adoption. While this transparency would be most helpful if consumers had more ability to act upon the information by switching ISPs, increased information is nonetheless critical to ensure that broadband providers can be held accountable by consumers and regulators.

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[4] Federal Communications Commission, National Broadband Plan(2010)
[5] National Broadband Map (June 2013)
[6] Free Press, Comcast-Time Warner Cable, Too Much Control (2014)
[7] New America Foundation, The Cost of Connectivity, New America Foundation (2013)

Furthermore, while the Transparency Rule was a good step, much more granularity should be provided for end-users. For example, it is well documented that ISPs have fallen short of the mark for providing customers with an accurate measure of their data consumption.[8] This is particularly troubling in the case of wireless services, where there can be a high cost to exceeding a data cap. If ISPs are going to impose data caps, their consumers must have the tools to accurately measure and manage data usage. No consumer, no family, wired or wireless, should be expected to pay for bandwidth usage that cannot be documented and verified with the same accuracy as electric or water usage. The Commission must take steps to ensure that ISPs are providing consumers with accurate information about data use. This is by no means an endorsement of usage billing, which I believe is unnecessary and disruptive to Internet innovation, but a recognition that if ISPs sell their product in this way that the consumer must be protected.

No Blocking or Paid Prioritization

The Commission proposes to reinstate the no-blocking rule from its 2010 *Open Internet Order*. A strong no-blocking rule is an important building block of a neutral network, and I agree with the Commission's proposal in this regard. It has soundly reasoned the importance of a robust no-blocking rule, which is one of the key elements of the policy needed to give edge providers the certainty they need to continue to expand and strengthen the Internet backbone and create innovative new products and services. However, the logic must be completed by a prohibition on paid prioritization. I disagree that the Commission can, as it now suggests, "allow individualized bargaining above a minimum level of access"[9] without significantly compromising the Internet ecosystem.

Sanctioning paid prioritization arrangements with edge providers would raise the barriers to entry for new businesses by fundamentally altering the character of the Internet through the institution of a pay-to-play regime for America's innovators. It will allow incumbents with sufficient resources to purchase a competitive advantage over new entrants. It will also allow for-profit companies to crowd out not-for-profit services. And it will eliminate the incentives for access providers to invest in technology to eliminate congestion by allowing them to profit from the congestion.

That congestion is what makes the difference between those grandparents in Texas being able to reliably see their grandchildren every night and a balky, pixilated and ultimately frustrating experience. It is vital to remember that these peer-to-peer technologies are at the very heart of

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[8] *See, e.g.*, "How do you you know if your broadband meter is accurate?," *Gigaom*, November 14, 2012; "How a law firm tested 'phantom' AT&T smartphone data use," *Ars Technica*, May 20, 2011; "How Your Wireless Carrier Overcharges You," *MIT Technology Review*, September 13, 2012

[9] Federal Communications Commission, Protecting and Promoting the Open Internet (NPRM), May 2014, para. 95

how the Internet is revolutionizing our lives and there is no deep pocket to pay for prioritization of those bits. Most important, it is not possible, in an IP-based network, to prioritize some bits without disadvantaging other bits. In a congested environment, which ISPs have an incentive to maintain when prioritization is allowed, that disadvantage can be the same as being blocked outright.

Proponents of paid prioritization argue that this concern can be overcome by an obligation not to degrade normal traffic and maintain a minimum level of acceptable service. But a "minimum level of service" is not a competitive level of service. A constantly buffered streaming service will never have the freedom or opportunity to compete with a service receiving paid prioritization. Even if edge providers in the slow lane eventually reach their destination during peak usage times, the playing field will be fatally tilted in favor of those in the fast lane.

In addition, the Commission should also assess the extent to which ISPs are using data caps as a means to manage network congestion or maximize company profits. In particular, the Commission should flat out prohibit the anticompetitive practice of favoring certain content -- and thereby disfavoring other content -- for purposes of counting data use against a data cap. This is simply paid prioritization by another name.

Finally, the Commission must recognize the relationship between what it does here and the global policy interests of the United States. Even if it believes it could find way to effectively police discrimination on a case-by-case basis without adversely impacting innovators and consumers in the U.S. market (and I do not believe it can), any regulatory approach that leaves room for discrimination in the U.S. context will be used by foreign governments as cover for a much more aggressive sort of discrimination intended to serve a very different set of national economic and policy interests.

Recent history instructs that foreign governments and foreign companies are looking for any opportunity to block, degrade, or otherwise discriminate against innovative, globally competitive U.S. internet services. In some instances governments are looking to advantage local competitors; in other instances governments simply want to shut down the sort of open communications platform that is delivered by U.S. internet services.

If the United States wants to be able to stand up for the principle of an Internet that is open across borders, an Internet across which data flows without disruption, then the Commission must make clear that it will accept nothing less within U.S. borders. Given the global implications of the Commission's rulemaking, it must resist the temptation to thread a ruling through legal and political nooks and crannies, and instead take this opportunity to adopt a clear and secure legal framework to undergird the proposition that the Internet functions best with transparency, without blocking, and without discrimination.

Title II

The Commission understands well the problem and the risks to the development of the Internet ecosystem if it does not regulate to preserve net neutrality. In 2010, it recognized that compromising the openness of the Internet, including by permitting discriminatory treatment of edge providers, could result in harms that "are significant and likely irreversible."[10] The risks identified by the Commission in 2010 have not gone away; if anything, the Internet is even more important to social and economic interactions and the market conditions are even more threatening.

In 2010, the Commission backed down from a coherent legal and policy position in an attempt to work out a mutually agreeable solution with access providers. But even that compromise did not buy regulatory certainty in the end. It is time to finally put this issue to rest and secure the regulatory environment that Congress envisioned when it revised the Communications Act in 1996.

Thus, the answer to companies that have challenged the Commission's previous regulatory efforts on legal grounds, and the Federal Circuit decision that struck them down only on this basis, is therefore not to change its policy approach, but rather to utilize the appropriate legal framework set out its authorizing statute. The Supreme Court has clarified that, under its *Chevron* doctrine, the Commission "must consider varying interpretations and the wisdom of its policy on a continuing basis."[11] The factual situation that "perhaps just barely" allowed the Commission to treat broadband access as part of an integrated information service no longer exists.[12]

Whatever legal gymnastics may be performed in the coming months, it is plain old common sense to any Internet user that broadband access providers -- *all* broadband access providers --

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[10] Federal Communications Commission, *Open Internet Order*(2010), paragraphs 24 and 25: "[B]roadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users. Although broadband providers have not historically imposed such fees, they have argued they should be permitted to do so. A broadband provider could force edge providers to pay inefficiently high fees because that broadband provider is typically an edge provider's only option for reaching a particular end user. Thus broadband providers have the ability to act as gatekeepers. Broadband providers would be expected to set inefficiently high fees to edge providers because they receive the benefits of those fees but are unlikely to fully account for the detrimental impact on edge providers' ability and incentive to innovate and invest, including the possibility that some edge providers might exit or decline to enter the market. The unaccounted-for harms to innovation are negative externalities, and are likely to be particularly large because of the rapid pace of Internet innovation, and wide-ranging because of the role of the Internet as a general purpose technology."

[11] *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981.

[12] *Id.* at 1003.

are providing telecommunications services covered by Title II. For a fee, they offer "directly to the public" services that consist of "transmission between or among points specified by the user, of information of the users choosing, without change in the form or content of the information as sent or received."[13] This broadband access is a separate and separable component of our bills (although the "triple play" structure is set up to do its best to disincentivize consumers from disaggregating their purchases of each service). The marketplace of Internet applications -- email, social networks, search engines, content -- is full of independent information services and service providers and very few customers choose to use the suite of information services also offered by their access providers.

The red herring arguments about the legal risks of "reclassification" of broadband access as a telecommunication service are simply distractions from the clear statutory framework set forth by Congress. But even if the statute does leave room for the Commission to use its discretion to continue to define broadband access as a service outside of the Title II regulatory framework, doing so will simply entrench a continuous cycle of enforcement and litigation proceedings that undermines the goal of creating a stable legal environment for innovation and growth. The lesson to be drawn by policymakers from past regulatory experience in this space is that the FCC should not design work-around policies in the hopes of avoiding legal scrutiny; it should make the right policy on the sound basis of the statutory framework that Congress has established.

However, while the statute and the economic counsel in favor of regulation under Title II, it is very important that the FCC always keep the original light-touch regulatory consensus as its touchstone. Congress explicitly provided forbearance authority precisely to ensure that services that fall within the Title II framework are only subject to the bare minimum of regulation necessary to ensure a healthy, competitive market environment. The facts on the ground demonstrate that some regulation is now needed. But the bottom line is this -- the Commission must forbear wherever possible, but regulate where the public interest requires it.

CONCLUSION

It is the duty of policymakers to work in public interest, and the public's interest is in an Internet that is open and available for innovation and speech regardless of ability to pay tolls. While I am glad that the Commission continues to emphasize the importance of transparency and no-blocking, there seems to be a walking-back from the principle of non-discrimination. I am concerned that the Commission's NPRM sets it on a path to abdicate its statutory responsibility to regulate so as to make available, without discrimination, rapid and efficient communication services with adequate facilities at reasonable charges.

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[13] 47 U.S.C. Sec. 153.

It is impossible to permit pay-to-play discrimination without disadvantaging everyone who does not pay. And it is impossible, given the architecture of the Internet, to prioritize more than a few players before the prioritization becomes meaningless. Paid prioritization is therefore destined to result in an Internet that tilts in favor of well-established and deep-pocketed players. And it is destined to create a set of disincentives for improving the technology for the benefit of all.

The answer is to regulate Internet access as Congress intended -- as a telecommunications service. This does not mean over-regulating the Internet. It means using a scalpel to deal with a specific market failure that threatens the public interest. I have always been a vocal advocate for applying a light touch to Internet regulation. I have authored and pushed for the passage of numerous pieces of legislation that protect the Internet from onerous litigation, discriminatory taxation, and excessive regulation. I will continue to stand up for proposition that we need to allow the Internet to be a place where disrupters and disruption are given a fair shot at reinventing the way we do business, organize, learn and communicate.

If, as policymakers, we keep three principles in mind -- public interest, non-discrimination, and light touch -- we will serve the public well.

Sincerely,

Ron Wyden

Ron Wyden
U.S. Senator